Hany E. William, Petitioner,
v.
IMMIGRATION AND
NATURALIZATION SERVICE,
Respondent.
No. 99-60422,
United States Court of Appeals,
Fifth Circuit.
July 17, 2000.

Bruce A. Coane, Ajay Kumar Choudhary (argued), Coane & Associates, Houston, TX, for Petitioner.

Matthew R. Hall (argued), Terri Jane Scadron, U.S. Dept. of Justice, Immigration Litigation, Civ. Div., Janet Reno, Atty. Gen., Robert L. Bombaugh, Director, Office of Immigration and Naturalization, Houston, TX, Lynne Underdown, Immigration and Naturalization Service, District Directors Office, Attn: Joe A. Aguilar, New Orleans, LA, for Respondent.

Petition for Review of an Order of the Board of Immigration Appeals.

Before DAVIS, SMITH and DENNIS, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Hany William petitions for review of an order of the Board of Immigration Appeals ("BIA") dismissing,

as untimely, his motion to reopen deportation proceedings. Concluding that the interpretation by the Immigration and Naturalization Service ("INS") of its regulation is not unreasonable, we deny the petition for review and affirm the order of the BIA.

I.

William, an Egyptian citizen, entered the United States on a student visa in 1992. In 1994, he was issued an order to show cause why he should not be deported for failing to maintain the conditions of his non-immigrant status. At the administrative hearing, he conceded his deportability but requested asylum.

An immigration judge denied his application for relief and ordered deportation. The Board of Immigration Appeals ("BIA") affirmed, dismissing William's direct appeal on September 24, 1997.

William filed a motion to reconsider on October 22, 1997, requesting withholding of deportation based on his change in marital status and his wife's eligibility for citizenship. The BIA construed his request as both a motion to reconsider its dismissal of his appeal and a motion to reopen to allow him to apply for adjustment of status based on the new fact of

his marriage to a lawful permanent resident.[1] The BIA denied the motion on April 30, 1998.

William filed a motion to reopen on July 28, 1998, attaching his marriage certificate and noting that his wife had completed the naturalization interview and tests and would be sworn in as a citizen in a few weeks. He requested permission to adjust his status once his wife was sworn in.

William submitted that his motion to reopen was timely because it was filed within ninety days of the denial of his motion to reconsider. The BIA disagreed, dismissing his motion to reopen as untimely and concluding that it should have been filed within ninety days of the dismissal of his direct appeal.

II.

INS regulations governing motions to reopen provide, in pertinent part, that "a party may file only one motion to reopen . . . and that motion must be filed no later than 90 days after the date on which the final

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[1] This ruling motivated the INS's argument that because the current motion was William's second motion to reopen, he was foreclosed from making that motion under 8 C.F.R. § 3.2(c)(2)'s requirement that he could file only one motion to reopen. But because the BIA did not address this argument in its decision, and because the INS does not reassert that argument on appeal, we do not consider it.

administrative decision was rendered in the proceeding sought to be reopened." 8 C.F.R. § 3.2(c)(2). William's petition for review presents an issue of first impression: whether the decision in William's original appeal to the BIA, as distinguished from the subsequent denial of his motion to reconsider, was "the final administrative decision . . . in the proceeding to be reopened." If the dismissal of his original appeal qualifies, then his motion to reopen was untimely. But if the denial of his motion to reconsider is the final decision under § 3.2(c)(2), the motion to reopen was timely.

William argues that under *Stone v. INS*, 514 U.S. 386, 115 S.Ct. 1537, 131 L.Ed.2d 465 (1995), the denial of a motion to reconsider is a final order of deportation and that the denial of a motion to reconsider is a final administrative decision from which the ninety-day clock should start running. Thus, he concludes that the BIA's construction of the regulation is inconsistent with its plain meaning and therefore is not entitled to deference.

The INS responds by also citing *Stone*, in which the Court decided whether the filing of a motion to reconsider or reopen tolls the time during which judicial review of the underlying deportation order may be sought. The Court held that an order of deportation is final, that a denial of a motion to reconsider is a second

final order, and the time limits for seeking judicial review of a final order apply separately to each final order. *See id.* at 395, 115 S.Ct. 1537.

Thus, the INS argues that under *Stone*, both the denial of the motion to reconsider and the dismissal of the appeal of the deportation order should be considered "final administrative decisions" for purposes of § 3.2(c)(2). The INS reasons further that because William's motion to reopen should relate to "the proceeding to be reopened," it is the underlying deportation decision, and not the denial of the motion to reconsider, that is being challenged. This is so because William seeks to introduce new evidence that he contends will affect his deportation — i.e., that his wife is going to become a citizen.

This evidence could not be introduced in a proceeding for a motion to reconsider, the INS notes, because that type of motion challenges only the legal analysis employed by the immigration judge. The deportation proceeding is the proper forum for this new evidence, because there the immigration judge can take into account any additional factors supporting discretionary relief from deportation. That is to say, because an alien who seeks to introduce new evidence can reopen only a proceeding that once was open for the receipt of evidence, the motion to reopen must look back to an evidentiary proceeding rather than to the

denial of reconsideration.

William tries to refute this construction by arguing that he seeks to reopen all deportation "proceedings" related to his case, which therefore would include both the original deportation decision and the denial of his motion to reconsider. Although this is not an implausible reading of the statute, the better interpretation is that the language of § 3.2(c)(2) is not so broad and, instead, refers only to a single "proceeding" that a party may seek to reopen, and, again, the government reasonably argues that the denial of a motion to reconsider cannot be "reopened" where it was never open to the type of new evidence William seeks to introduce.

Thus, while the regulation's use of "final administrative decision" is facially unambiguous, it invites, in the context of the next phrase, "rendered in the proceeding sought to be reopened," at least two reasonable interpretations. Therefore, the provision is, at most, ambiguous as to the question presented in this appeal, so we defer to the INS's reasonable interpretation of its own regulation. *See Ghassan v. INS*, 972 F.2d 631, 637 (5th Cir.1992).

William avers that we should not defer, because the INS's interpretation is plainly unreasonable. This is so, he asserts, because "final" can only mean the "last"

administrative decision in his case.

Although William's construction is not unreasonable, neither is the INS's, because "final administrative decision" refers to "the proceeding sought to be reopened." It is possible that, as William suggests, this phrase refers to the broader deportation process, but we cannot say that the INS's determination that the phrase refers to the particular stage of the process sought to be reopened is "plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994).

Accordingly, the petition for review is DENIED, and the order of the BIA is AFFIRMED.

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File: A73 122 128 - Houston Date: May 21, 1999
In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:
Hanna Z. Hanna, Esquire

ON BEHALF OF SERVICE: Donald W. Cassidy
Deputy District
Counsel

ORDER:

PER CURIAM. The motion to reopen has been filed out of time and will be denied. Our prior order in these proceedings was entered on September 24, 1997. Pursuant to 8 C.F.R. § 3.2(c)(2) with certain exceptions not pertinent here, a motion to reopen in any case previously the subject of a final decision by the Board must be filed not later than 90 days after the date of that decision, or on or before September 30, 1996, whichever is later. *See* 61 Fed. Reg. 18,900 (1996). In the instant case, a motion to reopen would have been due on or before December 23, 1997. The

record reflects, however, that the Board did not receive the motion until July 28, 1998. The motion to reopen was therefore filed out of time. Accordingly, the motion to reopen is denied.

Lauren R. Mathon
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A73 122 128 - Houston Date: April 30, 1998

In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
MOTION

ON BEHALF OF RESPONDENT:
Hanna Z. Hanna, Esquire
401 Broadway, Suite 804
New York, New York 10013

ON BEHALF OF SERVICE:
Benjamin D. Somera
Assistant District Counsel

CHARGE:
Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] - Nonimmigrant - failed to comply with conditions of status

APPLICATION: Reconsideration: reopening

ORDER:

PER CURIAM. The motion to reconsider is

denied. The motion to reopen is also denied.

On September 24, 1997, this Board dismissed the respondent's appeal from the Immigration Judge's July 27, 1995, decision denying his application for asylum and withholding of deportation under sections 208 and 242(h) of the Immigration and Naturalization Act, 8 U.S.C. §§ 1158, 1253(h), and ordering him deported from the United States to Egypt. By motion filed October 22, 1997, the respondent has asked the Board to reconsider its decision in the matter in light of an unpublished decision finding a well-founded fear of persecution in the case of a Coptic Christian from Egypt. In support of his motion, the respondent has proffered new evidence to bolster his argument that, as a Coptic Christian, he too has a well-founded fear of persecution. The Immigration and Naturalization Service opposes the motion.

As the Service points out in its statement of opposition, an unpublished decision is without precedential value. *Matter of Arthur*, 20 I&N Dec. 475, 479 (BIA 1992); *Matter of Medrano*, 20 I&N Dec. 216, 220 (BIA 1990, 1991). Moreover, we note that in the unpublished decision relied upon by the respondent, the alien was not found eligible for asylum because of a "pattern or practice of persecution" of Coptic Christians in Egypt. 8 C.F.R. § 208. 13(b)(2)(i) (1997). Rather, the alien established that he was particularly at

risk of persecution because of his involvement with religious and church activities. *See, e.g., Kotasz v. INS*, 31 F.3d 847, 853 (9th Cir. 1994) (holding that in non-pattern or practice cases, the risk faced by an individual because of membership in a disfavored group can rise to the level required for establishing a well-founded fear of persecution as a result of the individual's activities in support of the group). Thus, the case finding asylum eligibility is distinguishable from that of the respondent before us, who has presented no specific evidence of a "particularized threat of persecution" on account of his Coptic Christian religion or any of the other grounds protected under the Act. *Id.* We therefore decline to reconsider our dismissal of the respondent's appeal in this case. *See Matter of Cema*, 20 I&N Dec. 399 (BIA 1991), *aff'd, Cema v. INS*, 979 F.2d 212 (11th Cir. 1992); 8 C.F.R. § 3.2(b)(1) (1997).

The respondent alternatively seeks to reopen proceedings to allow him an opportunity to apply for adjustment of status based on his marriage to a lawful permanent resident.[1] Contrary to his assertions, though, the respondent has failed to establish prima

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1 The respondent appears to characterize such an opportunity as "withholding of deportation." However, to qualify for withholding of deportation under section 243(h) of the Act, he must establish a clear probability of persecution on account of a protected ground, which he has failed to do.

facie eligibility for adjustment of status. For instance, although he indicates that his wife has filed for naturalization, he has failed to show that an immigrant visa is "immediately available" to him. Section 245(a) of the Act, 8 U.S.C. § 1255(a). In any event, despite the Service's opposition to his motion, the respondent has failed to submit an adjustment application (Form 1-485). *See Matter of Yewondwosen*, Interim Decision 3327 (BIA 1997); 8 C.F.R. § 3.2(c)(1) (1997). Accordingly, we also deny the respondent's request for reopening.

Fred W. Vacca
FOR THE BOARD

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review
Falls Church, Virginia 22041

File: A73 122 128 - Houston

Date: SEP 24, 1997

In re: HANY E. WILLIAM
IN DEPORTATION PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Janet B. Beck, Esquire
Judith G. Cooper, P.C.
3040 Post Oak Boulevard, Suite 1450
Houston, Texas 77056-6511

ON BEHALF OF SERVICE:
Benjamin D. Somera
Assistant District Counsel

CHARGE:

Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] -Nonimmigrant - failed to comply with conditions of status

APPLICATION: Asylum; withholding of deportation; voluntary departure; remand

In a decision dated July 27, 1995, the Immigration Judge found the respondent deportable as charged, denied his application for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158, 1253(h), and ordered him deported from the United States to Egypt. The respondent has appealed. The appeal will be dismissed. The request for oral argument is denied. *See* 8 C.F.R. § 3.1(e).

The respondent is a 24-year-old Coptic Christian from Egypt who claims that the Egyptian government suspects him of being an Israeli spy. On appeal, he argues through counsel that he was deprived of a fair hearing before the Immigration Judge. More specifically, he maintains that the Immigration Judge refused to allow him to present evidence on his own behalf, denied him his right to counsel, and erroneously admitted into evidence the Immigration and Naturalization Service's notice of intent to deny his prior asylum application. He also contends that the Service trial attorney was inappropriately permitted to advise and question him regarding the relief of voluntary departure. With his appeal, he has proffered new evidence.

Having reviewed the record, we find no merit to the appeal. The respondent's fair hearing claim essentially turns on the issue of whether he was truly

denied his right to counsel. The record reflects that the manner in which the hearing was held was largely related to the fact that the respondent was unrepresented. As the respondent was unrepresented, he had no advocate to present evidence on his behalf or to conduct his direct examination once the issue of his deportability was settled.[1] We note in this regard that notwithstanding counsel's arguments on appeal, the record includes no evidence whatsoever that the respondent himself ever proffered any evidence, including witnesses, at the hearing.

However, the record further reflects that on April 26, 1995, the respondent was advised of his right to counsel at his own expense and provided with a list of

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[1] The respondent does not appear to contest his deportability as a nonimmigrant who failed to maintain or comply with the conditions of his nonimmigrant status. Rather, his arguments focus on his applications for relief from deportation, for which he alone bears the burden of proof. *E.g. Matter of S-M-J-*, Interim Decision 3303 (BIA 1997); *Matter of Dass*, 20 I&N Dec. 120 (BIA 1989); *Matter of Seda*, 17 I&N Dec. 550, 554 (BIA 1980); 8 C.F.R. §§ 208.13(a). 208.16(b); 242.17(e). 244.1. While both the Immigration Judge and the Service have a role to place in producing an adequate record for the adjudication of an asylum claim, their obligations in this respect do not shift the burden of proof. *See Matter of S-M-J-, supra* at 11 n.3.

available free legal services programs in his area in accordance with the regulations at 8 C.F.R. § 242.16(a) (Tr. at 2-3). *See* sections 242(b)(2) and 292 of the Act, 8 U.S.C. §§ 1252(b)(2), 1362. This is not even disputed on appeal. Nevertheless, the respondent argues that the Immigration Judge failed to adequately inquire whether he wished to retain counsel or to determine whether his waiver of this right was effective. We consider this argument specious. The respondent was offered a continuance to obtain counsel, but indicated that he wished to proceed on his own and represent himself (Tr. at 3). Moreover, at the reconvened hearing on the merits of the respondent's applications for relief from deportation, the respondent again appeared without counsel despite having been advised by the Immigration Judge at the conclusion of his prior hearing that he could still obtain counsel if he so desired. As the reconvened hearing was held on July 27, 1995, it is apparent the respondent had ample opportunity to secure counsel and, for whatever reason, simply failed to do so. Therefore, we are fully satisfied that the respondent's waiver of his right to counsel was knowingly, intelligently, and competently made, and thus, the Immigration Judge was under no obligation to make a further inquiry in this regard. *See Cobourne v. INS*, 779 F.2d 1564 (11th Cir. 1986); *Matter of Gutierrez*, 16 I&N Dec. 226 (BIA 1977).

In the absence of counsel for the respondent,

his examination was left primarily to the Service trial attorney. Unlike the respondent, the Service trial attorney also introduced documentation into evidence, including an affidavit by the respondent which counsel relies upon in restating the facts of the respondent's asylum claim on appeal even though it is inconsistent with his testimony. Indeed, the documentation apparently was introduced for the sole purpose of impeaching the respondent's testimony. This case is therefore distinguishable from *Olabanji v. INS*, 973 F.2d 1232 (5th Cir. 1992), where the Service sought to rely on hearsay evidence from an alien's spouse and a forensic document analyst to prove the alien's deportability for marriage fraud. As such, we find no basis for concluding that the notice of intent to deny at issue on appeal was inadmissible. *See Calderon-Ontiveros* v. INS, 809 F.2d 1050 (5th Cir. 1986); *Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); *Matter of Barcenas*, 19 I&N Dec. 609 (BIA 1988); 8 C.F.R. § 242.15(c). We point out, however, that there is no indication that the Immigration Judge relied on the notice in denying the respondent's claim. We also find no evidence that the Service trial attorney misadvised the respondent as to voluntary departure, particularly as it was explained to him on the record that a grant of that form of relief would not necessarily mean that he would return to Egypt (Tr. at 48).

In any event, we note that in deportation

proceedings, "an alien has not been given a fair hearing only if he has been prejudiced by some deficiency so as to deprive him of due process." *Matter of D-*, 20 I&N Dec. 827, 831 (BIA 1994); *see, e.g., Prichard-Ciriza v. INS*, 978 F.2d 219 (5th Cir. 1992); *Calderon-Ontiveros v. INS, supra; Matter of Santos*, 19 I&N Dec. 105 (BIA 1984). In this case, counsel for the respondent argues at length that the proceedings were defective, but she fails to demonstrate how the respondent's case would have been affected had the hearing been conducted differently. We emphasize in this regard that while evidence has been proffered on appeal, there has been no showing that such evidence could not have been presented before the Immigration Judge. We therefore find no basis for a remand of the record. *See Matter of Coelho*, 20 I&N Dec. 464 (BIA 1992); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 74 (BIA 1984) ("The Board is an appellate body whose function is to review, not to create, a record.").

As for the merits of the respondent's asylum claim, we note that "[p]ersecution is an extreme concept, which ordinarily does not include '[d]iscrimination on the basis of race or religion, as morally reprehensible as it may be." *Fisher v. INS*, 79 F.3d 955, 961 (9th Cir. 1996) (quoting *Ghalv v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995); *see also Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) ("[T]he concept of persecution does not encompass all treatment that our

society regards as unfair, unjust, or even unlawful or unconstitutional."); *Balazoski v. INS*, 932 F.2d 638 (7th Cir. 1991) (finding that "persecution" means more than harassment); *Matter of Pierre*, 15 I&N Dec. 461, 463 (BIA 1975) ("Not every unlawful act of individual harassment will amount to persecution" within the meaning of the Act.). The respondent before us admitted that he has never been arrested, detained, or physically abused by the Egyptian authorities (Tr. at 31). He vaguely indicated that he has been mistreated or fears mistreatment by Islamists, but the background evidence of record indicates that "[s]ecurity forces arrest terrorists who perpetrate violence against Copts," though as in this country, the government does not always prevent terroristic attacks (Exh. 8).

Thus, we are not persuaded that the government condones religiously-motivated violence or that it is unable or unwilling to protect its Coptic Christian minority. *See Ghalv v. INS*, 58 F.3d 1424, 1431 (9th Cir. 1995); *Yacoub v. INS*, 999 F.2d 1296, 1297 (8th Cir. 1993); *Elnager v. INS*, 930 F.2d 784, 789 (9th Cir. 1991); *cf. Singh v. INS*, 94 F.3d 1353 (9th Cir. 1996) (finding an Indo-Fijian eligible for asylum where he faced persistent death threats and assaults despite having reported each and every threat and assault to the police and identifying his assailants by name); *Abdel-Masieh v. INS*, 73 F.3d 579 (5th Cir. 1996) (holding that the Board erred in denying asylum

to a Christian Sudanese who brought forward evidence that the current military government had consistently promoted an agenda for imposing Islamic laws on all Sudanese citizens and that those efforts by the government had markedly increased religious intolerance and discrimination throughout the country). Moreover, while he claims that he has been investigated for espionage, his own testimony indicates that this is because of his frequent trips to Israel to visit his father, who works for Egyptian Airlines, rather than his actual or imputed political opinion.[2] In short, we find insufficient evidence to support the contention that the respondent has been persecuted or has a well-founded fear of persecution on account of one of the grounds protected under the Act. *See INS v. Elias-Zacarias*, 502 U.S. 478 (BIA 1992); *INS v. Cardoza-Fonseca*, 480

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[2] For instance, in contrast to his affidavit, the respondent testified that he was interrogated when he would "come back to Egypt" (Tr. at 22), indicating that he was only subject to routine questioning at the border upon his returns from Israel. Indeed, while the Egyptian government certainly has a right to investigate its citizens for espionage, *see Matter of R-O-*. 20 I&N Dec. 455 (BIA 1992), we doubt that the respondent was ever even seriously suspected of being a spy, because his passport apparently was never revoked (Tr. at 32). *See Urokov v. INS*, 55 F.3d 222 (7th Cir. 1995); *Rodriguez-Rivera v. INS*, 848 F.2d 998, 1006 (9th Cir. 1988).

U.S. 421 (1987); *Matter of S-P-*, Interim Decision 3287 (BIA 1996); *Matter of R-O-*, 20 I&N Dec. 455 (BIA 1992). It follows that he has not satisfied the clear probability standard of eligibility required for withholding of deportation. *See INS v. Cardoza-Fonseca, supra; INS v. Stevic*, 467 U.S. 407 (1984); *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987).

The respondent failed to qualify himself for voluntary departure. The regulations at 8 C.F.R. § 244.1 require that an alien establish that he "is willing and has the immediate means with which to depart promptly from the United States." The respondent, however, testified that he is unwilling to depart and that he does not have "the funds" (Tr. at 49).

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

Mary Maguire Dunne
FOR THE BOARD